JUDGMENT OF THE COURT (Fourth Chamber)

10 April 2008 *

In Case C-393/06,

REFERENCE for a preliminary ruling under Article 234 EC, from the Vergabekontrollsenat des Landes Wien (Austria), made by decision of 17 August 2006, received at the Court on 22 September 2006, in the proceedings

Ing. Aigner, Wasser-Wärme-Umwelt GmbH

v

Fernwärme Wien GmbH,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis, E. Juhász (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

* Language of the case: German.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 11 October 2007,

after considering the observations submitted on behalf of:

— Ing. Aigner, Wasser-Wärme-Umwelt GmbH, by S. Sieghartsleitner and M. Pichlmair, Rechtsanwälte,

— Fernwärme Wien GmbH, by P. Madl, Rechtsanwalt,

— the Hungarian Government, by J. Fazekas, acting as Agent,

— the Austrian Government, by M. Fruhmann and C. Mayr, acting as Agents,

— the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

— the Swedish Government, by A. Falk, acting as Agent,

— the Commission of the European Communities, by X. Lewis, acting as Agent, assisted by M. Núñez-Müller, Rechtsanwalt,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The reference was made in the course of proceedings between Ing. Aigner, Wasser-Wärme-Umwelt GmbH ('Ing. Aigner') and Fernwärme Wien GmbH ('Fernwärme Wien') concerning the regularity of a public procurement procedure instituted by the latter.

Legal context

Community legislation

3 Directive 2004/17 coordinates the procurement procedures in specific sectors, that is to say, those of water, energy, transport and postal services. It follows and repealed Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), which concerned the same subject-matter.

4 The particular characteristics of the sectors covered by Directive 2004/17 are highlighted in the third recital in the preamble thereto, which states that it is necessary to coordinate procurement procedures in these sectors because of the closed nature of the markets in which the contracting entities concerned operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned.

5 The second section of Article 2(1)(a) of Directive 2004/17 and the second section of Article 1(9) of Directive 2004/18 provide that 'contracting authorities', inter alia, are 'bodies governed by public law', that is to say

'… any body:

— established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character,

— having legal personality and

financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law'.

6 In accordance with Article 2(1)(b) of Directive 2004/17:

‘For the purposes of this Directive,

…

(b) a “public undertaking” is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.’

7 Article 2(2) of that directive provides:

‘This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

(b) which, when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 3 to 7, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.’

8 Articles 3 to 7 of Directive 2004/17 list the sectors to which the Directive applies. These are gas, heat and electricity (Article 3), water (Article 4), transport services (Article 5), postal services (Article 6) and exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports and airports (Article 7).

9 Article 3(1) of that directive provides:

'As far as gas and heat are concerned, this Directive shall apply to the following activities:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat; or

(b) the supply of gas or heat to such networks.'

10 Article 9 of that directive states as follows:

'1. A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.

However, the choice between awarding a single contract and awarding a number of separate contracts may not be made with the objective of excluding it from the scope of this Directive or, where applicable, Directive 2004/18/EC.

2. If one of the activities for which the contract is intended is subject to this Directive and the other to the abovementioned Directive 2004/18/EC and if it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with the abovementioned Directive 2004/18/EC.

…'

11 Article 20(1) of that directive, under the heading 'Contracts awarded for purposes other than the pursuit of an activity covered or for the pursuit of such an activity in a third country', provides:

'This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 3 to 7 or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Community.'

12 Finally, Article 30 of Directive 2004/17, under the heading 'Procedure for establishing whether a given activity is directly exposed to competition', provides:

'1. Contracts intended to enable an activity mentioned in Articles 3 to 7 to be carried out shall not be subject to this Directive if, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted.

2. For the purposes of paragraph 1, the question of whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the Treaty provisions on competition, such as the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or services in question.

…'

13 Title II, Chapter II, Section 3 of Directive 2004/18 lists the contracts which are outside the scope of that directive. These include contracts in the water, energy, transport and postal services sectors. Article 12, dealing with those contracts, provides:

'This Directive shall not apply to public contracts which, under Directive 2004/17/EC, are awarded by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of that Directive and are awarded for the pursuit of those activities, …

…'

14 The abovementioned Community legislation was transposed into Austrian law by the Federal law on the award of public procurement contracts (Bundesvergabegesetz) 2006.

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 Fernwärme Wien was established by constituent instrument of 22 January 1969 for the purpose of supplying district heating to homes, public institutions, offices, undertakings etc. in the City of Vienna. For that purpose it uses energy produced by the disposal of waste rather than energy from non-renewable sources.

16 Fernwärme Wien, which has legal personality, is wholly owned by the City of Vienna, which appoints and removes managers and the members of the company's supervisory board and gives them a discharge from responsibility. In addition, through the Kontrollamt der Stadt Wien (Monitoring Office of the City of Vienna), the city is also authorised to monitor the economic and financial management of the company.

17 In parallel to its district heating activities, Fernwärme Wien is engaged in the general planning of refrigeration plants for large real estate projects. In carrying out that activity it competes with other undertakings.

18 On 1 March 2006, Fernwärme Wien instituted a public procurement tendering procedure for the installation of refrigeration plants in a future commercial office complex in Vienna, stating that the Austrian legislation relating to public procurement did not apply to the contract in question. Ing. Aigner participated in this procedure by submitting a tender. Having been informed, on 18 May 2006, that its offer would no longer be considered because of negative references, it challenged that decision before the referring court, submitting that the Community rules on public procurement should be applied.

19 The national court notes that the activities of Fernwärme Wien with regard to the operation of a fixed district heating network fall indisputably within the scope of Directive 2004/17. However, its activities with regard to the refrigeration plants do not fall within the field of application of that directive. It therefore asks whether the latter activities are also covered by the provisions of that directive by application, *mutatis mutandis*, of the principles laid down in Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraphs 25 and 26, an approach commonly referred to in legal literature as the 'contagion theory'. In accordance with the interpretation given by the referring court of that judgment, where one activity carried out by a body falls within the scope of the public procurement directives, all the other activities carried out by that body, irrespective of their possible industrial or commercial character, are also covered by those directives.

20 If the judgment in *Mannesmann Anlagenbau Austria and Others* refers only to contracting authorities and, more specifically, the concept of 'bodies governed by public law', in the sense that, where a body meets needs in the general interest, not having an industrial or commercial character, it must be considered a 'body governed by public law' within the meaning of the Community rules, irrespective of whether it carries out, in parallel, other activities of a different nature, the referring court asks whether Fernwärme Wien constitutes a body governed by public law, that is to say a contracting authority, within the meaning of Directives 2004/17 and 2004/18.

21 Finally, the referring court asks whether, when a body carries out activities not having an industrial or commercial character and, in parallel, activities in competitive conditions, whether it is possible to distinguish the latter activities and not to include them in the scope of the Community rules on public procurement, it is possible to establish a separation between those two types of activities and, accordingly, the absence of economic interference between them. In that regard, the referring court refers to

point 68 of the Opinion of Advocate General Jacobs of 21 April 2005 in the case which gave rise, following the withdrawal of the reference for a preliminary ruling, to the order for removal from the register of 23 March 2006 (Case C-174/03 *Impresa Portuale di Cagliari*), where it is proposed that the principle arising from the judgment in *Mannesmann Anlagenbau Austria and Others* be tempered in that manner.

22 Having regard to the foregoing, the Vergabekontrollsenat des Landes Wien (Public Procurement Review Chamber of the Province of Vienna) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Directive 2004/17 … be interpreted as meaning that a contracting entity which pursues one of the sectoral activities referred to in Article 3 of that directive also falls within the scope of that directive in relation to an activity pursued in parallel under competitive conditions?

(2) In the event that this is the case only in respect of contracting authorities: must an undertaking such as [Fernwärme Wien] be characterised as a body governed by public law within the meaning of Directive 2004/17 or Directive 2004/18 … if it provides district heating in a given area without any real competition, or must the market for domestic heating, which also includes energy sources such as gas, oil, coal etc., be taken into account?

(3) Must an activity pursued under competitive conditions by a company which also pursues activities of a non industrial or non commercial nature be included within the scope of Directive 2004/17 or Directive 2004/18 if, through effective precautions such as separate balance sheets and accounts, cross financing of the activities pursued under competitive conditions can be excluded?'

The questions referred for a preliminary ruling

The first question

23 By this question, the referring court asks whether a contracting entity within the meaning of Directive 2004/17, which carries on activities in one of the sectors listed in Articles 3 to 7 of that directive, is required to apply the procedure laid down in that directive for the award of contracts to the activities carried out by that entity in parallel, under competitive conditions, in sectors not governed by those provisions.

24 In order to answer that question, it must be noted that Directives 2004/17 and 2004/18 have noteworthy differences with regard both to the entities subject to the rules laid down in those respective directives and to their nature and scope.

25 With regard, firstly, to the entities to which the rules of those directives apply, it should be noted that, unlike Directive 2004/18 which, by virtue of the first subparagraph of Article 1(9) thereof, applies to 'contracting authorities', Directive 2004/17 refers, in Article 2 thereof, to 'contracting entities'. It is apparent from Article 2(2)(a) and (b) that Directive 2004/17 applies not only to contracting entities which are 'contracting authorities', but also to those which are 'public undertakings' or undertakings which operate on the basis of 'special or exclusive rights granted by a competent authority of a Member State', in so far as all those entities pursue one of the activities listed in Articles 3 to 7 thereof.

26 Secondly, it follows from Articles 2 to 7 of Directive 2004/17 that the coordination for which it provides does not extend to all spheres of economic activity, but relates to specifically defined sectors, which, moreover, is confirmed by the fact that that directive is commonly referred to as the 'sectoral directive'. However, the scope of Directive 2004/18 includes almost all sectors of economic life, thus justifying its being commonly known as the 'general directive'.

27 In such circumstances, it must be stated at this early stage that the general scope of Directive 2004/18 and the restricted scope of Directive 2004/17 require the provisions of the latter to be interpreted narrowly.

28 The boundaries between the fields of application of those two directives are also drawn by explicit provisions. Thus, Article 20(1) of Directive 2004/17 provides that the latter does not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 3 to 7 thereof. The equivalent of that provision in Directive 2004/18 is the first paragraph of Article 12, which provides that that directive does not apply to public contracts which are awarded by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of Directive 2004/17.

29 Thus, the field of application of Directive 2004/17 is strictly circumscribed, which does not permit the procedures laid down therein to be extended beyond that field of application.

30 Consequently, the abovementioned provisions leave no room for application, in the context of Directive 2004/17, of the approach known as 'contagion theory' which was

developed following the judgment in *Mannesmann Anlagenbau Austria and Others*. That judgment was given by the Court in the context of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), that is to say in an area which at present falls within the ambit of Directive 2004/18.

31 Accordingly, as rightly observed by, inter alia, the Hungarian, Austrian and Finnish Governments and by the Commission of the European Communities, only those contracts awarded by an entity which is a 'contracting entity' within the meaning of Directive 2004/17, in connection with and for the exercise of activities in the sectors listed in Articles 3 to 7 of that directive, fall within the field of application thereof.

32 Moreover, that is the conclusion which emerges also from Joined Cases C-462/03 and C-463/03 *Strabag and Kostmann* [2005] ECR I-5397, paragraph 37). In that judgment, the Court held that, if a contract does not concern the exercise of one of the activities governed by the sectoral directive, it will be governed by the rules laid down in the directives concerning the award of public supply, works or service contracts, as applicable.

33 Having regard to the foregoing, the answer to the first question must be that a contracting entity, within the meaning of Directive 2004/17, is required to apply the procedure laid down in that directive only for the award of contracts which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of that directive.

The second question

34 By its second question, the referring court asks whether an entity such as Fernwärme Wien is to be regarded as a body governed by public law within the meaning of Directive 2004/17 or of Directive 2004/18.

35 In that regard, it should be borne in mind that, as is apparent from paragraph 5 of this judgment, the provisions of the second subparagraph of Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18 contain identical definitions of the concept of 'body governed by public law'.

36 It is clear from those provisions that a 'body governed by public law' is any body which, firstly, was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, secondly, has legal personality and, thirdly, is financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law. In accordance with the case-law of the Court, those three conditions are cumulative (Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraph 40, and the case-law cited).

37 Furthermore, since the aim of the directives in relation to awarding public contracts is to avoid, inter alia, the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones, the concept of a 'body governed by public law' must be interpreted in functional terms (Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173, paragraphs 36 and 37, and the case-law cited).

38 In the present case, it is common ground that the latter two criteria established by the rules set out in paragraph 36 of the present judgment are fulfilled, given that Fernwärme Wien has legal personality and that the City of Vienna wholly owns the share capital of that entity and monitors its economic and financial management. It remains to be considered whether the entity was established specifically to meet needs in the general interest, not having an industrial or commercial character.

39 With regard, firstly, to the purpose of the establishment of the entity in question and the nature of the needs met, it is appropriate to note that, as is apparent from the documents before the Court, Fernwärme Wien was established specifically for the purpose of supplying district heating to homes, public institutions, offices, undertakings etc. in the City of Vienna by means of the use of energy produced by the destruction of waste. At the hearing before the Court, it was stated that, at present, that heating system serves approximately 250 000 homes, numerous offices and industrial plants and, in practice, all public buildings. To provide heating for an urban area by means of an environmentally-friendly process constitutes an aim which is undeniably in the general interest. It cannot, therefore, be disputed that Fernwärme Wien was established specifically to meet needs in the general interest.

40 In that regard, it is immaterial that such needs are also met or can be met by private undertakings. It is important that they should be needs which, for reasons in the general interest, the State or a regional authority generally chooses to meet itself or over which it wishes to retain a decisive influence (see, to that effect, Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraphs 44, 47, 51 and 53, and Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605, paragraphs 37, 38 and 41).

41 Secondly, in order to ascertain whether the needs met by the entity in question in the main proceedings have a character other than industrial or commercial, account must be taken of all the relevant law and facts such as the circumstances prevailing at the time when the body concerned was established and the conditions under which it exercises its activity. In that regard, it is important to check, inter alia, whether the body in question carries on its activities in a situation of competition (Case C-18/01 *Korhonen* [2003] ECR I-5321, paragraphs 48 and 49).

42 As stated in paragraph 39 of the present judgment, Fernwärme Wien was established specifically for the purpose of supplying district heating in the City of Vienna. It is

common ground that the pursuit of profit did not underlie its establishment. While it is not impossible that those activities may generate profits distributed in the form of dividends to shareholders of the entity, the making of such profits can never constitute its principal aim (see, to that effect, *Korhonen*, paragraph 54).

43 With regard, subsequently, to the relevant economic environment or, in other words, the relevant market which must be considered in order to ascertain whether the entity in question is exercising its activities in competitive conditions, account must be taken, as the Advocate General proposes in points 53 and 54 of his Opinion, having regard to the functional interpretation of the concept of a 'body governed by public law', of the sector for which Fernwärme Wien was created, that is to say the supply of district heating by means of the use of energy produced by the burning of waste.

44 It is clear from the order for reference that Fernwärme Wien enjoys a virtual monopoly in that sector, since the two other undertakings operating in that sector are of negligible size and accordingly cannot constitute true competitors. Furthermore, there is a considerable degree of autonomy in this sector, since it would be very difficult to replace the district heating system by another form of energy, since this would require large-scale conversion work. Finally, the City of Vienna attaches a particular importance to this heating system, not least for reasons of environmental considerations. Thus, having regard to the pressure of public opinion, it would not permit it to be withdrawn, even if that system were to operate at a loss.

45 Having regard to the various indications provided by the referring court and as the Advocate General observes in point 57 of his Opinion, Fernwärme Wien is currently the only undertaking capable of meeting such needs in the general interest in the sector under consideration, so that it might choose to be guided by considerations other than economic ones in the award of its contracts.

46 In the judgments in *BFI Holding* (paragraph 49) and *Agorà and Excelsior* (paragraph 38), the Court held that the existence of significant competition may be an indication in support of the conclusion that there is no need in the general interest, not having an industrial or commercial character. In the circumstances of the case in the main proceedings, it is clear from the reference for the preliminary ruling that the criterion requiring the existence of significant competition is far from fulfilled.

47 It must be borne in mind that it is immaterial whether, in addition to its duty to meet needs in the general interest, an entity is free to carry out other profit-making activities, provided that it continues to attend to the needs which it is specifically required to meet. The proportion of profit-making activities actually pursued by that entity as part of its activities as a whole is also irrelevant for its classification as a body governed by public law (see, to that effect, *Mannesmann Anlagenbau Austria and Others*, paragraph 25; *Korhonen*, paragraphs 57 and 58; and Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 56).

48 In the light of the foregoing considerations, the answer to the second question must be that an entity such as Fernwärme Wien is to be regarded as a body governed by public law within the meaning of the second subparagraph of Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18.

The third question

49 By its third question, the referring court asks whether all contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17

or Directive 2004/18, are to be subject to the rules of one or the other of those directives if, through effective precautions, a clear separation is possible between the activities carried out by that body to accomplish its task of meeting needs in the general interest and the activities which it carries out in competitive conditions, so that cross financing between the two types of activities can be excluded.

50 It should be borne in mind in that regard that the problem underlying that question was examined by the Court for the first time in the case which gave rise to the judgment in *Mannesmann Anlagenbau Austria and Others* relating to the interpretation of Directive 93/37 on public works contracts, and that the Court came to the conclusion, in paragraph 35 of that judgment, that all contracts, of whatever nature, entered into by a contracting authority were to be subject to the rules of that directive.

51 The Court reiterated that position, with regard to public service contracts, in the judgments in *BFI Holding* (paragraphs 55 and 56) and *Korhonen* (paragraphs 57 and 58) and, with regard to public supply contracts, in the judgment in *Adolf Truley* (paragraph 56). That position also applies to Directive 2004/18, which represents a recasting of the provisions of all the preceding directives on the award of public contracts which it follows (see, to that effect, *Bayerischer Rundfunk*, paragraph 30).

52 That conclusion is inescapable also in respect of entities which use an accounting system intended to make a clear internal separation between the activities carried out by them to accomplish their task of meeting needs in the general interest and activities which they carry out in competitive conditions.

53 As the Advocate General points out in points 64 and 65 of his Opinion, there must be serious doubts that, in reality, it is possible to establish such a separation between

the different activities of one entity consisting of a single legal person which has a single system of assets and property and whose administrative and management decisions are taken in unitary fashion, even ignoring the many other practical obstacles with regard to reviewing before and after the event the total separation between the different spheres of activity of the entity concerned and the classification of the activity in question as belonging to a particular sphere.

54 Thus, having regard to the reasons of legal certainty, transparency and predictability which govern the implementation of procedures for all public procurement, the case-law of the Court set out in paragraphs 50 and 51 of the present judgment must be followed.

55 Nevertheless, as is apparent from paragraph 49 of the present judgment, the question posed by the referring court at the same time relates to Directives 2004/17 and 2004/18.

56 In that regard, it should be noted that, in the context of the examination of the second question referred for a preliminary ruling, it was held that an entity such as Fernwärme Wien is to be regarded as a body governed by public law within the meaning of Directive 2004/17 or of Directive 2004/18. Furthermore, in examining the first question referred for a preliminary ruling, the Court concluded that a contracting entity, within the meaning of Directive 2004/17, is required to apply the procedure laid down in that directive only for the award of contracts which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 thereof.

57 It is appropriate to state that, in accordance with the case-law of the Court, contracts awarded in the sphere of one of the activities expressly listed in Articles 3 to 7 of Directive 2004/17 and contracts which, although different in nature and thus capable normally, as such, of falling within the scope of Directive 2004/18, are used in the

exercise of activities defined in Directive 2004/17 fall within the scope of the latter directive (see, to that effect, *Strabag and Kostmann*, paragraphs 41 and 42).

58 Consequently, the contracts awarded by an entity such as Fernwärme Wien are covered by the procedures laid down in Directive 2004/17 since they are connected with an activity which it carries out in the sectors listed in Articles 3 to 7 thereof. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18.

59 The answer to the third question must therefore be that all contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17 or Directive 2004/18, which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of Directive 2004/17 must be subject to the procedures laid down in that directive. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18. Each of these two directives applies without distinction between the activities carried out by that entity to accomplish its task of meeting needs in the general interest and activities which it carries out under competitive conditions, and even where there is an accounting system intended to make a clear internal separation between those activities in order to avoid cross-financing between those sectors.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **A contracting entity, within the meaning of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors is required to apply the procedure laid down in that directive only for the award of contracts which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of that directive.**

2. **An entity such as Fernwärme Wien GmbH is to be regarded as a body governed by public law within the meaning of the second subparagraph of Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.**

3. **All contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17 or Directive 2004/18, which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of Directive 2004/17 must be subject to the procedures laid down in that directive. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18. Each of these two directives applies without distinction between the activities carried out by that entity to accomplish its task of meeting needs in the general interest and activities which it carries out under competitive conditions, and even where there is an accounting system intended to make a clear internal separation between those activities in order to avoid cross financing between those sectors.**

[Signatures]